MARCEL JUDE JOSEPH & ANOR A

v.

THE MINISTER OF EDUCATION & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
DAVID WONG DAK WAH J
[BKI-13JR-4-2-2012]
24 MAY 2012

CIVIL PROCEDURE: *Judicial review - Order of certiorari - Res judicata - Application for order of certiorari to quash decision to abolish policy of teaching science and mathematics in English - Whether doctrine of res judicata applied - Whether subject matter of dispute justiciable - Rules of the High Court 1980, O. 53 r. 3(6) - Federal Constitution, art. 161* C D

The first applicant filed the present application under O. 53 r. 3(6) of the Rules of the High Court 1980 seeking reliefs against the respondent's decision to abolish the policy of teaching science and mathematics in the English language in the state of Sabah. Earlier in 2011, the first applicant had filed an *ex parte* application ('the previous case') seeking the same reliefs as the present suit. The application was dismissed with costs on the ground that the application was frivolous, lacked substance and did not justify further argument on substantive motion. Instead of appealing against the decision of the learned judge in the previous case, the first applicant filed the present application whereby the second applicant was included. The issues for the court's determination were (i) whether the present suit was an abuse of court process or *res judicata*; and (ii) whether there was justiciability of the subject matter. E F G

Held (dismissing the application):

(1) The first applicant should have appealed to the Court of Appeal. Instead, the first applicant attempted to relitigate or ventilate the same issues in the present case. Comparing the pleadings and grounds of decision of the previous case to the pleadings in the present application, there was a mirror image as they both raised the same issues in similar factual context. This blatantly contravened the doctrine of *res judicata* whereby H I

A the first applicant is prohibited from initiating the present suit. The previous suit had put a finality to the subject matter of dispute. However, the issue of *res judicata* did not apply to the second applicant as she was not a party to the previous suit. (paras 9 & 10)

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(2) The usage of the English language in the High Court of Sabah and Sarawak is specifically provided for in art. 161 of the Federal Constitution. However, nowhere in art. 161 did it refer to the matter of education or for the requirement of the use
C of English in the teaching in Mathematics and Science. The simple implication is that unless it is specifically provided for in the Federal Constitution or any other legislation, no such restriction is placed on the government in formulating policies for the education system in the country. Hence, the
D introduction or reversal of PPSMI was a matter of government policy. Governmental policies cannot be questioned by the court of law which concerns only with interpretation of the law enacted by Parliament. The executive arm of the government decides what policy should be implemented and if
E the people are not happy, their remedy lies with the court of public opinion. (para 17)

Case(s) referred to:

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

F *Goh Hock Hai v. EON Bank Bhd [2012] 4 CLJ 956 HC* ***(refd)***

Marcel Jude Joseph v. The Minister of Education, Malaysia [2012] CLJ 196 HC ***(refd)***

Tang Kwor Nam & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***

G *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA* ***(refd)***

Legislation referred to:

Federal Constitution, art. 161

Rules of the High Court 1980, O. 53 rr. 3(2), 3(6), 7(1)

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For the applicants - Marcel Jude Joseph; M/s Marcel Jude Joseph & Co
For the respondents - Rahazlan Affandi; SFC

Reported by Najib Tamby

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JUDGMENT

David Wong Dak Wah J:

Introduction

[1] Before me is an application by the 1st and 2nd applicants for leave for judicial review under O. 53 r. 3(6) of the Rules of the High Court 1980 seeking for the following reliefs:

(i) An order of *certiorari* in so far as the State of Sabah is concerned to quash the decision of the respondents to abolish the PPSMI (Pengajaran dan Pembelajaran Sains dan Matematik dalam Bahasa Inggeris/Pengajaran dan Pembelajaran Sains dan Matematik dalam Bahasa Inggeris);

(ii) And/or in the alternative an order of *mandamus* to the respondents in so far as the State of Sabah is concerned to continue implementation of PPSMI in the State of Sabah;

(iii) And/or in the alternative an order of prohibition to the respondents in so far as the State of Sabah is concerned to restrain the respondents from abolishing of PPSMI in the State of Sabah;

(iv) And/or in the alternative a declaration in so far as the State of Sabah is concerned that the decision by the respondents to abolish PPSMI in the State of Sabah is *ultra vires* and unlawful;

(v) In the event this application is not within the time stipulated under O. 53 r. 3(6) then an order for the extension of time until 20 February 2012 for the filing of this *ex parte* leave for judicial review;

(vi) Any other relief deemed fit by this Honourable Court.

Background Facts

[2] On 14 November 2011, the 1st applicant had filed an *ex parte* application for leave for judicial review *vide* case BKI-25-58/11-2011 (the previous case) seeking for the same reliefs as in this case. In the previous case, on 6 January 2012, the 1st applicant had obtained an order from the Senior Assistant Registrar to include the 2nd applicant as a party to the

application. That order however was set aside by the learned judge on 17 February 2012 on the ground that the Senior Assistant Registrar had no jurisdiction to hear any application under O. 53 r. 7(1). Also on the same day, the learned judge had dismissed the application for leave with costs on the ground that the application was "frivolous, lack of substance and it did not justify further argument on substantive motion".

[3] On 20 February 2012, instead of appealing against the decision of the learned judge in the previous case, the 1st applicant filed this application before me seeking for the above reliefs. In this application, 2nd applicant has been included and therefore the applicants are Marcel Jude Joseph as 1st applicant and Evelyn June binti Charlie (aka Madam Eve) as 2nd applicant; the respondents are the Minister of Education as 1st respondent, the Ministry of Education as 2nd respondent and the Government of Malaysia as 3rd respondent.

Contentions Of Respondents

[4] Learned Senior Federal Counsel submits that leave should not be granted on the following grounds:

(i) Abuse of court process/*res judicata*.

(ii) Non-Justiciability of the subject matter.

(iii) No *locus standi*.

(iv) Failure to fulfil conditions for a *mandamus* order.

(v) Non-compliance with O. 53 r. 3(2) of the Rules of the High Court 1980.

The Doctrine Of Res Judicata

[5] In *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321, the doctrine of *res judicata* was laid out in the following words:

> Now *res judicata* is not merely a technical rule of pleading. It is a doctrine of substantial justice. It is a process whereby justice is achieved procedurally by precluding a party from re-agitating in subsequent proceedings a complaint or an issue that had, or could fairly have, been disposed in earlier proceedings between the same

parties or their privies. It is merely equity in action in the procedural arena. It is sometimes referred to as the rule in *Henderson v. Henderson* [1843] 67 Er 313. In that case, Wigram VC said:

> In trying this question I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applied, except in special cases, not only to points upon which the court was actually required by the parties to form on opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.
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> The doctrine may thus be seen to encompass several categories. In its narrowest sense, *res judicata* I think, refers to estoppels by record. It refers to the actual decision the earlier action or proceedings. In its wider sense, it encompasses issued, and cause of action that could justly and fairly have been equally adjudicated in the earlier suit or proceedings. This wider operation of the doctrine is sometimes referred to 'constructive *res judicata*'. It houses the twin concepts of issue estoppels and cause of action estoppels. Like the tree of which they form the branches, they are designed to ensure that there is finality in litigation.

[6] The applicants contended that the issue of *res judicata* should only be applied when there is a finality of decision. The 1st applicant who is representing himself and also acting for the 2nd applicant submitted that:

> This is trite law and an application for leave for judicial review in this matter does not show that finality because a number of issues were raised and not properly ventilated before the court.

[7] I have no doubt that counsel for the applicants is correct in his contention. As pointed out by Justice Varghese George Varughese in the case of *Goh Hock Hai v. EON Bank Bhd* [2012] 4 CLJ 956, the doctrine of *res judicata* are undergirded by these:

1. The general public interest policy the same issue (or cause of action or issue) should not be litigated more than once (even if the parties are different); and

2. The requirement of certainty and finality which are the two pillars on which the judicial process rests.

[8] To determine whether the concept of *res judicata* is applicable I have to peruse the grounds of judgment in the previous case – *Marcel Jude Joseph v. The Minister of Education, Malaysia* [2012] CLJ 196 which I have done and it can be said His Lordship's findings are as follows:

> (6) The decision by the respondent to abolish the PPSMI is a non-justiciable decision and is not capable of judicial determination. The litigation process and the expertise of the court are not suited for resolving the question in hand: see *De Smith's Judicial Review* (6th Ed.). Its resolution is beyond the institutional competence of the court and would involve the court stepping outside its appropriate constitutional role: see *The Concept of Justiciability' in Administrative Law* in Groves & Lee, Australian Administrative Law (2007).
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> (7) It is not for the court to interfere with the decision of the Government because the wisdom and policy decision of the Government belongs to the Government. The court cannot tell the public authority how to exercise its power: See *Government of Malaysia v. Lim Kit Siang & Another Case* [1998] 1 CLJ (Rep) 63. The decision to abolish the PPSMI was clearly a policy decision undertaken by the Government based on the exercise of function by the respondent as Minister of Education and as such the applicant has no legal right to compel the respondent to continue with the implementation of the PPSMI in the State of Sabah.
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> In short the application for leave is frivolous and lacks substance. It does not justify further argument on a substantive motion. In the circumstances, the application is dismissed with costs.

[9] Comparing the pleadings and grounds of decision of the previous case to that of the pleadings of this application, one can see that one is a mirror image of the other as they both raise same issues in similar factual context. Hence the only conclusion I can make is that the 1st applicant is attempting to relitigate or ventilate the same issues in this case. This blatantly contravenes the doctrine of *res judicata* which means the 1st applicant is prohibited from initiating this suit. The previous suit had put 'finality' to the subject matter of dispute between the 1st applicant and the respondents. The 1st applicant with respect should have appealed to Court of Appeal if he felt he was wrongly done by.

[10] However, the issue of *res judicata* does not apply to the 2nd applicant in this case and my reason is simply that the 2nd applicant was not a party to the previous suit as Senior Assistant Registrar's order was struck out. The grounds of His Lordship in the previous case made that clear and I quote:

> ... Therefore the order allowing the inclusion of Evelyn and the Ministry as parties to the action was obtained irregularly. So is the order granting leave to the applicant to amend his statement of facts.
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> An order that has been obtained irregularly is not a valid order and is liable to be set aside without the necessity of going through the appeal process.
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> ... Thus the only parties to the application are the original parties, namely Marcel Jude Joseph and the Minister of Education, Ministry of Education, Malaysia.

Non-justiciability Of The Subject Matter

[11] The issue which needs to be deliberated is simply whether leave should be granted to the 2nd applicant. Gopal Sri Ram (as he then was) in *Tang Kwor Nam & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 sets out the position in the following manner:

> (1) Applications for leave under O. 53 are made - and they must be made – through a two stage process. The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous. If, for example, the applicant is a busybody, or the application is made out of

A time or against a person or body that is immunised from being impleaded in legal proceedings then the High Court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable, eg, proceedings in Parliament. (paras 5 & 10)

(2) To say that a case is frivolous is the same thing as saying that there is no arguable case. Where the High Court has a doubt about whether the case is frivolous or not, it is for that court to invite the putative respondent to attend and make representations as to whether or not leave should be granted. So, the putative respondent to the substantive motion is not entitled as a matter of right to appear, demand to be heard and to convert the proceedings into a full blown opposed *ex parte* hearing on the merits of the application. (para 14)

[12] Similar sentiments are expressed in the case of *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235, where Justice Suriyadi JCA held that:

... The inevitable outcome, after considering all the facts again, was that the leave application must be dismissed as no arguable case had been made out by the appellant. It would be pointless to grant leave, even if the appellant were to have sufficient interest over the matter, if it was crystal clear that its case was a hopeless one on its merits or that the appellant's case rested only on non-justiciable issues.

[13] It is the contention of the 2nd applicant that the decision to abolish PPSMI has contravened art. 161 of the Federal Constitution which reads as follows:

161. Use of English and of native languages in States of Sabah and Sarawak.

(1) No Act of Parliament terminating or restricting the use of the English language for any of the purposes mentioned in Clauses (2) to (5) of Article 152 shall come into operation as regards the use of the English language in any case mentioned in Clause of this Article until ten years after Malaysia Day.

(2) Clause (1) applies - A

(a) to the use of the English language in either House of Parliament by a member for or from the State of Sabah or Sarawak; and

(b) to the use of the English language for proceedings in the High Court in Sabah and Sarawak or in a subordinate court in the state of Sabah or Sarawak, or for such proceedings in the Federal Court or the Court of Appeal as are mentioned in Clause (4); and B

(c) to the use of the English language in the State of Sabah or Sarawak in the Legislative Assembly or for other official purposes (including the official purposes of the Federal Government). C

(3) Without prejudice to Clause (1), no such Act of Parliament as is there mentioned shall come into operation as regards the use of the English language for proceedings in the High Court in Sabah and Sarawak or for such proceedings in the Federal Court or the Court of Appeals as are mentioned in Clause (4), until the Act or the relevant provision of its has been approved by enactments of the Legislatures of the States of Sabah and Sarawak; and no such Act shall come into operation as regards the use of the English language in the State of Sabah or Sarawak in any other case mentioned in paragraph (b) or (c) of Clause (2), until the Act or the relevant provision of it has been approved by an enactment of the Legislature of that State. D E

(4) The proceedings in the Federal Court or the Court of Appeal referred to in Clauses (2) and (3) are any proceedings on appeal from the High Court in Sabah and Sarawak or a judge thereof, and any proceedings under Clause (2) of Article 128 for the determination of a question which has arisen in proceedings before the High Court in Sabah and Sarawak or a subordinate court in the State of Sabah or Sarawak. F G

[14] Education is a matter which the Federal Government has exclusive jurisdiction as agreed in the Malaysia Agreement when Malaysia was formed. What that means simply is that it is the Federal Government which has the exclusive right to determine what kind of education policy should be implemented in the whole of Malaysia provided that policy does not contravene the Federal Constitution. H

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[15] According to the statement regarding PPSMI in the website of the Ministry of Education (see http://en.wikipedia.org/wiki/PPSMI), the rationale behind this policy is this:

> The rationale for the decision to change the medium of instruction from the Malay Language to English for the teaching and learning of Science and Mathematics subjects was made based on the government's concern on the nation's human capital development towards achieving the standard of a developed country, as well as an early preparation to compete in the era of globalization.
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> It is widely known that the field of science and mathematics form the basis and have a crucial role in the progress and development of a country. Various innovations and discoveries in these two fields happen rapidly and information access is mostly in the English language.
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> English language is also the language spoken internationally and mastery in this language would allow easy access to information in these fields.
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> In conclusion, the policy decision to implement PPSMI was made to ensure students' mastery in science and mathematics in view of the fact that most of the sources are available in the English language. Indirectly, it is also hoped that the implementation of PPSMI would contribute to the enhancing of students' command of the language.

[16] PPSMI was introduced in 2003 but after some eight years of implementation, the government in 2012, after much deliberation and consultation with various political and non-political bodies, decided to reverse that policy of teaching Mathematics and Science in the English language.

[17] Having read art. 161 of the Federal Constitution with care, it seems quite clear to me that nowhere in that article does it refer to the matter of Education or for that matter the requirement of the use of English in the teaching in Mathematics and Science. The use of the English language in the High Court of Sabah and Sarawak is specifically provided for in art. 161. The simple implication is that unless it is specifically provided for in the Federal Constitution or any other legislation, no such restriction is placed on the government in formulating policy for the education system

in the country. Hence the introduction or reversal of PPSMI is a matter of government policy, nothing more, nothing less. Policies of government of course cannot be questioned by the Court of Law which concerns only with interpretation of the law enacted by Parliament. The executive arm of government decides what policy should be implemented and if the people are not happy, their remedy lies with the court of public opinion.

Other Grounds

[18] In view of my view on grounds one and two, it is not necessary for me to deal with other grounds put forth by the learned Senior Federal Counsel.

Conclusion

[19] For reasons stated above, I dismiss the application made by both applicants. As for costs, I award the sum of RM2,000 to the respondents.